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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

WAYNE FILBY, Plaintiff and Appellant, v. ROBERT KELLS et al., Defendants and Respondents.	C043349 (Sup.Ct.No. PO002155)

Robert Kells had Bernard Smith installed a television antenna on a tower at the Kells ranch. Many years later, the antenna failed and Kells asked Smith to look at it. Smith, who had retired, determined a new rotor was needed, and asked Wayne Filby, the owner of a television repair shop, to fix the problem. Filby had done such repairs many times and agreed to do the job for $40. He fell and suffered serious injuries, including a loss of memory.

Filby sued Kells and others not party to this appeal, seeking damages. In many cases an injured worker tries to show he was an independent contractor and thereby avoid the exclusivity of workers' compensation. Here, because Kells had no compensation insurance, if Filby was his employee under the compensation laws, the lack of insurance would arguably trigger a statutory presumption of negligence.

The undisputed facts show Filby was not an employee under the compensation laws, and therefore the presumption of negligence is not triggered. Because Filby lacks evidence of any failings by Kells, he cannot prove negligence. We reject Filby's claims that the trial court committed reversible error in drafting the summary judgment order and in denying the new trial motion. Therefore, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

By amended form complaint Filby alleged Kells (including for our purposes the Kells Trust), Smith, and certain equipment manufacturers and distributors were liable for personal injuries arising on December 17, 1999, when Filby "was working on an antenna tower, using a lanyard as a safety device . . . when the nylon rope unraveled and caused plaintiff to fall more than 30 feet[.]" The complaint alleged legal theories, styled as separate "causes of action," for general negligence, premises liability and (as to the manufacturer and distributor defendants) products liability.

Kells filed a boilerplate answer.

Smith was dismissed from the case.

Kells moved for summary judgment, asserting the evidence showed he asked Smith to fix the antenna, and Smith, who had retired, arranged for Filby, a television repairman, to work on the tower for a $40 fee. Filby used his own tools and never had contact with Kells. Kells argued that Filby was an independent contractor. Kells also argued he was not negligent and Filby could not avail himself of the "peculiar risk" rule.

Kells relied largely on Filby's deposition, as follows: Filby had the choice whether or not to do the job (replacing a rotor) that Bernard Smith offered to him. Filby had taken such jobs 10-20 times in the past. Smith paid him $40 in cash for doing a similar job the week before, which was expected to take about two hours. Filby did not have a standard hourly rate and testified his practice was to "do it by the job, the amount of labor." He had done such work since 1976, when he took over his father's business. He used his own tools.

Kells also tendered a declaration from his daughter, which described the property as about one acre where Kells lived, surrounded by about 200 acres of the family farm. The antenna tower is about 20 feet from the house. She declared Kells had no workers' compensation insurance. Lack of such insurance allows an injured employee to maintain a civil suit. (See Lab. Code, § 3706.)

Kells submitted Filby's interrogatory responses, which indicated that he did not have any evidence as to why Kells was liable, and did not know how the accident took place. Filby claimed to be an employee, stating "I was hired by Bernard Smith

who was hired by Robert Kells . . . to perform the work I was apparently performing, for compensation, at the time of my injuries."

Filby filed an opposing declaration stating he had been hired by Smith, and neither he nor Smith had a contractor's license. As one of *Filby's* tendered undisputed material facts he alleged the payment was "essentially" $40 per hour and the job was expected to take one hour. And in deposition Filby was asked if Smith told him what he would be paid and Filby answered "Basically, I believe he said $40." Smith in deposition testified he did not remember what price was discussed, but ambiguously testified $40 "was about a standard price for by the hour." Filby's father's declaration asserts that Smith selected the tools and drove Filby to the property.

The opposition claimed that by statute Filby was presumed to be an employee of Kells because neither he nor Smith held a contractor's license. In such circumstances, an uninsured employer's negligence is presumed by statute. (Lab. Code, § 2750.5, 3708.)

The reply urged that the complaint failed to allege the "employee" theory pressed in the opposition and therefore facts supporting that theory were outside the pleadings and, hence, immaterial. Further, Labor Code section 3352, subdivision (h), discussed below, precluded a finding Filby was an employee because he worked less than 52 hours and earned less than $100. The trial court (William S. Lebov, J.) granted summary judgment by an order stating in part "the plaintiff earned less than $100

in wages from the Kells defendants. [Citation.] The plaintiff has failed to raise a dispute of material fact. In particular, the plaintiff may not rely upon the presumption of employer negligence because the plaintiff was not an employee within the meaning of Labor Code section 3798 [*sic*, 3708]. [¶] Labor Code section 2750.5 supplements and does not override the definitions of Section 3352. [Citation.] If a homeowner employs an unlicensed contractor, the unlicensed contractor is presumed to be an employee as defined by Section 3351 *et seq*. Since the plaintiff is excluded from that definition by Section 3352(h), he is not an employee under Section 3351. Therefore, the presumption of employer negligence does not apply. The plaintiff's inability to prove negligence by the Kells defendants entitled the defendants to judgment as a matter of law."

Filby moved for a new trial, which the trial court (Thomas E. Warriner, J.) deemed a motion for reconsideration and denied as untimely. After the trial court denied reconsideration of that ruling, Filby filed a notice of appeal.

STANDARD OF REVIEW

We review the trial court's ruling granting summary judgment de novo, and construe the facts and reasonable inferences therefrom in favor of Filby. (*Marie Y. v. General Star Indemnity Co*. (2003) 110 Cal.App.4th 928, 949.) However, Filby, as the appellant, has the burden to demonstrate reversible error, even in a summary judgment case. (*Guthrey v.*

State of California (1998) 63 Cal.App.4th 1108, 1115-1116 (*Guthrey*).)

DISCUSSION

I

Filby contends Judge Lebov misapplied the Labor Code and should not have granted the summary judgment motion because Labor Code section 2750.5 "provides a conclusive presumption that appellant was the employee of respondents at the time of the accident" and as an uninsured employer, Kells is presumed to be negligent. (Further unspecified statutory references are to the Labor Code.) For purposes of this appeal we accept Filby's argument that he is an employee, but reject his view that he can invoke the presumption of negligence. Kells demonstrated that Filby has no evidence of negligence, and therefore the trial court properly granted summary judgment.

Kells points out that the pleadings delimit the scope of a summary judgment motion (*Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1499), and that the operative complaint fails to allege Filby was an employee, nor did he seek leave to amend. However, the complaint alleged negligence, and Filby's employment theory, if sound, provides a route for showing negligence.

Section 2750.5 creates "a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to [the Contractor's State License Law], or who is performing such services for a person who is required to obtain such a license is an employee rather

than an independent contractor." Under his view, if Filby can show a contractor's license was required, he will be presumed an employee. (*Fernandez v. Lawson* (2003) 31 Cal.4th 31, 34; see *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 327-328, 330; see *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 13.) To avoid this presumption Kells would have to prove Filby retained control of the method of work, among other factors. (See § 2750.5, subds. (a)-(c).) Filby further argues that if the presumption of employee status is unrebutted, Kells, as an uninsured employer, will be presumed negligent. (§ 3708.)

Business and Professions Code section 7026 broadly defines "contractor" to mean any person who, among other things, "improve[s]" "any building . . . or other structure[.]" Filby contends fixing a rotor on an antenna tower falls within the meaning of this statute.

The reach of the licensing law is construed broadly, to protect consumer-landowners (although here a broad construction has a different impact). (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 380, 385-387.) We accept, *arguendo*, Filby's claim, although the point is debatable. (Compare *Packard-Bell Electronics Corp. v. Dept. of Prof. & Voc. Standards* (1966) 242 Cal.App.2d 387, 393 ["ordinary repair of television, radio or phonographic equipment normally used in the home" does not require contractor's license]; with 64 Ops.Cal.Atty.Gen. 33, 34 (1965) [person who repairs well pump needs such license].)

For purposes of this appeal, we accept that Filby is presumed to be an employee of Kells, and that the motion did not show undisputed facts sufficient to overcome the presumption. At issue is what was referred to in the trial court as the "de minimis" exclusion.

Section 3700 requires that every employer carry worker's compensation insurance or be self-insured. If an employer fails to do so, an injured employee (including an employee by virtue of section 2750.5) may bring an action at law against his or her employer "as if" the compensation laws "did not apply." (§ 3706.) Section 3708 states: "In such action it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence." Section 3708, however, creates an exception for certain workers. It states "This section shall not apply to any employer of an employee, as defined in subdivision (d) of Section 3351, with respect to such employee, . . ."

Section 3352 (§ 3352) provides in part: "'Employee' excludes the following: . . . (h) Any person defined in subdivision (d) of Section 3351 who was employed . . . for less than 52 hours during the 90 calendar days immediately preceding the date of the injury . . . or who earned less than one hundred dollars ($100) in wages from the employer during the 90 calendar days immediately preceding" the injury. In turn, section 3351, subdivision (d) defines as an employee "Except as provided in subdivision (h) of Section 3352, any person employed by the

owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, . . ."

"Subdivision (d) of section 3351 encompasses situations where a homeowner hires someone to make repairs on the premises, such as a plumber or carpenter." (*Furtado v. Schriefer* (1991) 228 Cal.App.3d 1608, 1614-1615 (*Furtado*).) The undisputed facts show Filby was making repairs to the Kells residential television antenna, therefore this statute applies to this case. This does not deprive Filby of the ability to sue Kells (see *Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227, 234-237; *Rosas v. Dishong* (1998) 67 Cal.App.4th 815, 819-822), but it does render the presumption of negligence provided by section 3708 inapplicable, by its own terms.

Filby earned less than $100, and falls within the de minimis household repair exclusion, as the trial court concluded. Also, as discussed at oral argument in the trial court, Filby did not work 52 hours, since he was injured on the day he started work.

Filby attempted to dispute what he was to be paid, by pointing to Smith's declaration, quoted above, wherein Smith *did not remember*, but testified $40 was a common price "for by the hour." Filby's own statement of facts asserted he was to be paid "essentially" $40 per hour and the work was expected to take one hour. We find no evidence he was going to earn more. Even if we add in the $40 he may have been paid for a similar job the week before, allegedly at the Kells Ranch, that still

does not exceed $100. Nor does it show he worked more than 52 hours, whereas the facts in the record show he was injured the day he began work.

Tort suits for personal injuries against employers who are not covered by the compensation laws are governed by section 2801. (See *Mantonya v. Bratlie* (1948) 33 Cal.2d 120, 123 [where employment is not under division 4 of the compensation laws, tort suit against employer for injuries is governed by division 3, specifically, section 2801]; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Worker's Compensation, § 39, p. 593 (Witkin).) In such cases slight contributory negligence does not bar the action, assumption of the risk is no defense, and an employer cannot defend by blaming a coworker. (§ 2801.) However, unlike with section 3708, the burden of proving negligence is on the employee. (See *Devens v. Goldberg* (1948) 33 Cal.2d 173, 176-177; Witkin, *supra*, § 39, p. 593.)

The motion for summary judgment tendered Filby's discovery responses, which show he had no evidence that Kells was negligent in any way. The opposition failed to produce evidence of negligence, and Filby's opening brief does not provide any argument regarding evidence of negligence or any basis for premises liability. We will not make those arguments for him. (*People v. Gidney* (1937) 10 Cal.2d 138, 142-143.) Nor will we consider arguments made for the first time in the reply brief. (*Kahn v. Wilson* (1898) 120 Cal. 643, 644.) Filby has failed to carry his burden to show error.

II

Filby contends Judge Lebov did not adequately explain why summary judgment was proper.

The failure to provide an adequate statement of reasons is not reversible per se. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448-449; *Unisys Corp. v. California Life & Health Ins. Guarantee Assn.* (1998) 63 Cal.App.4th 634, 640.) It is Filby's burden to show prejudicial error. (*Guthrey*, *supra*, 63 Cal.App.4th at pp. 1115-1116.) All he does is state that the ruling did not address "other issues . . . such as the application of the peculiar risk doctrine and general negligence of the Kells defendants." But he makes no argument about those theories. "Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner." (*Estate of Palmer* (1956) 145 Cal.App.2d 428, 431.) Filby's failure to analyze prejudice waives the contention of reversible error. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106 (*Paterno*).)

III

Filby contends Judge Warriner should not have treated the new trial motion as one for reconsideration.

The agreed statement on appeal supports Filby's claim that Judge Warriner ruled that new trial motions were not available in summary judgment cases and a reconsideration motion would be untimely.

In *Carney v. Simmonds* (1957) 49 Cal.2d 84, the court clarified the scope of new trial motions, rejecting an argument that such motions were limited to cases involving factual contests. It is well-settled that a party may file a new trial motion to attack an order granting summary judgment. (See *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 858 (*Aguilar*).) But we review a trial court's ruling, not its reasoning. (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.) Unless the new trial motion was meritorious, we will not disturb Judge Warriner's order. (*Aguilar*, *supra*, at pp. 859-860.)

As Kells points out, Filby's opening brief fails to provide an argument about the merits of the new trial motion. Filby has thus failed to show prejudice and the contention of reversible error is waived. (*Paterno*, *supra*, 74 Cal.App.4th at pp. 105-106.) To the extent Filby argues the merits of the motion in the reply brief, the argument lacks analysis or authority (*Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 608 [waiver]) and comes too late (*Kahn v. Wilson*, *supra*, 120 Cal. at p. 644 [waiver]).

DISPOSITION

The judgment is affirmed. Filby shall pay Kells's costs on appeal. (Cal. Rules of Court, rule 27(a).)

MORRISON, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.